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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

*Petitioners*,

—v.—

KAREN FINLEY, *et al.*,

*Respondents*.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether 20 U.S.C. §954(d)(1), which imposes the criteria of "general standards of decency and respect for the diverse beliefs and values of the American public" on a National Endowment for the Arts funding program designed to support a diverse range of private expression, is unconstitutionally viewpoint-based and vague.

## RULE 29.6 STATEMENT

This brief is filed on behalf of four individuals and one nonprofit corporation, the National Association of Artists' Organizations (NAAO). NAAO does not have any parent or subsidiary companies.

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## STATEMENT OF THE CASE

Congress created the National Endowments for the Arts and the Humanities (NEA) in 1965, in order "to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of this creative talent." 20 U.S.C. §951(7). The overriding standard for arts grants was to be "artistic and humanistic excellence." S. Rep. No. 300, 89th Cong., 1st Sess. 4 (June 8, 1965). The Senate Report devoted an entire section to "Freedom of Expression," and noted:

> It is the intent of the committee that in the administration of this act there be given the fullest attention to freedom of artistic and humanistic expression . . . . Countless times in history artists and humanists who were vilified by their contemporaries because of their innovations in style or mode of expression have become prophets to a later age.
>
> Therefore, the committee affirms that the intent of this act should be the encouragement of free inquiry and expression . . . . [C]onforming for its own sake is not to be encouraged, and . . . no undue preference should be given to any particular style of thought or expression.

*Id.* at 3-4.

For its first 24 years of existence, the NEA was governed by these standards of free expression, with statutory grant criteria that focused on artistic excellence. "Peer panels" of experts in various disciplines reviewed applications and made recommendations for grants, providing substantial insulation from the political pressures that might otherwise distort the decisionmaking process. *See* Pet.App. 4a.

In 1989, however, in response to controversial photographs by the artists Robert Mapplethorpe and Andrès Serrano that were displayed with the support of NEA grants, Congress for the first time imposed ideological restrictions on the agency that were unrelated to artistic merit. Section 304(a) of Pub. L. No. 101-221, 103 Stat. 701, 741 (1989), provided that no funds appropriated for the NEA or the NEH

> may be used to promote, disseminate, or produce materials which in the judgment of the [NEA or NEH] may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, and sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political or scientific value.

This "obscenity" restriction, as implemented by the NEA, was held unconstitutional in *Bella Lewitzsky Dance Foundation v. Frohnmayer*, 754 F.Supp. 774 (C.D.Cal. 1991), and the government did not appeal.

NEA grants continued to be the subject of political controversy, and in June 1990, the NEA Chairperson, under political pressure, decided to reject unanimous recommendations by a peer review panel to award Solo Performance Arts Fellowships to Karen Finley, Holly Hughes, Tim Miller, and John Fleck. This lawsuit followed in September 1990, alleging that the Chairperson had denied the four fellowships not on artistic merit grounds, but because of the controversial political ideas contained in the plaintiffs' work, which addressed such issues as homosexuality, AIDS, and violence against women. Plaintiffs claimed that these ideologically motivated grant denials violated their First Amendment rights as well as the NEA's governing statute.



Two months after the suit was filed, and in the wake of another legislative battle over arts funding, Congress amended the NEA statute to insert the directive at issue in this petition and struck down by the courts below. It requires, for the first time, that in judging arts applications, the NEA must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. §954(d)(1). Representative Henry, the author of this "decency and respect" amendment, clearly explained its purpose and intended effect:

> This substitute includes language in the heart of the grantmaking process. We add to the criteria of artistic excellence and merit a shell, a screen, a viewpoint that must constantly be taken into account.

136 Cong.Rec. H9417 (Oct. 11, 1990). The amendment does not define "decency," "respect," or the "beliefs and values of the American public."[1]

In contrast to the previous year's "obscenity" limitation, the "decency and respect" provision did not merely restrict artwork specifically funded by the NEA, but effectively imposed a content and viewpoint-based condition on an applicant's whole lifetime of artistic production. This was because grants were based on "past performance evaluation

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[1] Congress rejected two alternative bills that would have incorporated the Federal Communications Commission's definition of "indecent." *See* 136 Cong.Rec. H9442 (Oct. 11, 1990); 136 Cong.Rec. H9674 (Oct. 15, 1990)(Rohrabacher and Regula amendments incorporating FCC definition); 136 Cong.Rec. H9448-49 (rejecting Rohrabacher amendment); 136 Cong.Rec. H9683-84 (replacing Regula amendment with "decency and respect" provision).

and other pertinent information";[2] that is, on an "applicant's entire body of work."[3]

In December 1990, a month after the passage of §954(d)(1), the National Council on the Arts met and discussed how the "decency and respect" language would be enforced.[4] The Council resolved that peer review panels would apply the new standards "as a matter of course because each panelist brought to the table their community's standards of decency and this would become part of the deliberative process."[5] In keeping with this resolution, NEA officials instructed all peer review panel members to apply their own standards of decency in judging applications: "the basic instruction that the panels receive [is] that by virtue of your backgrounds and by virtue of your diversity you represent the general standards of decency . . . . You bring your general standards of decency from your communities, from you[r] backgrounds, from your ethnic backgrounds, and that is how we deal with it."[6] Both NEA Chairpersons responsible for implementing the provision before it was struck

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[2] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 232 (Feb. 21, 1991)(testimony of NEA Chairperson John Frohnmayer).

[3] Fiscal Year 1992 Application Guidelines for NEA Theater Grants, p.65. This was a part of the Supplemental Excerpts of Record filed with the court of appeals (hereinafter "SER"), at 90.

[4] The Council is a 26-member body that advises the Chairperson on all grant recommendations. *See* 20 U.S.C. §955. The Chairperson makes the ultimate decision. 20 U.S.C. §954(c).

[5] Minutes of December 1990 Retreat of National Council on the Arts (March 18, 1991), SER at 23.

[6] Transcript of December 1990 Retreat of National Council on the Arts, Statement of NEA General Counsel Julianne Davis, SER at 65.



down also testified that they personally would review grant applications to ensure that the applications conformed to the "decency" and "respect" standard.[7] In implementing §954(d)(1), therefore, the NEA declined to provide any substantive clarification of the statutory terms, and left the interpretation and enforcement of the "decency and respect" requirement to the individual judgments of hundreds of peer panel members, 26 National Council members, and the Chairperson.

In March 1991, plaintiffs amended their suit to challenge the constitutionality of §954(d)(1). They were joined by the National Association of Artists' Organizations, which sued on its own behalf and as representative of its hundreds of member artists and arts institutions, which regularly apply for and receive NEA grants. The amended complaint alleged that the "decency and respect" requirement was both unconstitutionally viewpoint-based and void for vagueness, thereby inviting arbitrary and discriminatory decision-making.

In late 1991, the parties filed cross-motions: the government for judgment on the pleadings, and the plaintiffs for summary judgment as to the facial unconstitutionality of the"decency and respect" law. On June 9, 1992, the federal district court denied the government's motion and granted the plaintiffs', ruling that 20 U.S.C. §954(d)(1) was fatally vague and overbroad, in violation of the First and Fifth

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[7] *Department of the Interior and Related Agencies Appropriations for 1992*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 234 (Feb. 21, 1991)(testimony of NEA Chairperson John Frohnmayer); *Department of the Interior and Related Agencies Appropriations for 1993*, Hearings Before the Subcommittee on the Department of the Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 2d Sess. 613-14 (May 5, 1992)(testimony of NEA Chairperson Anne-Imelda Radice).

Amendments. Pet.App. 69a-88a. The parties ultimately settled the claims of the four individual plaintiffs that their Performance Arts Fellowships had been unlawfully denied.[8] The government appealed the judgment striking down the "decency and respect" law.

A panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling on November 5, 1996. Relying on both the First and Fifth Amendment strands of vagueness doctrine, the panel held that "decency and respect" provides "no 'ascertainable standard for inclusion and exclusion,'" so that persons of "common intelligence must necessarily guess at [the] meaning'" of the statute. Pet.App. 17a (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974), and *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The Court explained that "[t]he individual members of a pluralistic society, and particularly our own, have a great variety of beliefs and values, largely unascertainable." Pet.App. 18a. The "decency and respect" clause thus "gives rise to the danger of arbitrary and discriminatory application." *Id.* The panel majority rejected the argument of Judge Kleinfeld in dissent that government benefit programs are exempt from constitutional vagueness scrutiny if the benefits offered are "not generally available." As in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. __, __, 115 S.Ct. 2510, 2519-20 (1995), the panel said, "the scarcity of a government benefit does not render it immune from constitutional limitations." Pet. App. 5a, n.2.[9]

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[8] The NEA agreed to pay plaintiffs the amounts of the vetoed grants, plus damages for statutory violations, and attorneys' fees. Stipulation and Settlement Agreement, filed June 9, 1993.

[9] The court of appeals also agreed with the district court that the "decency" and "respect" mandates could not be read as simply advisory, or (continued...)



The court of appeals also found that the "decency and respect" requirement was unconstitutionally viewpoint-based. Unlike the subsidy program at issue in *Rust v. Sullivan*, 500 U.S. 173 (1991), here the government was not seeking to convey its own message but to promote a diversity of private artistic styles and ideas in "'a traditional sphere of free expression,'" much like a public university. Pet.App. 21a (quoting *Rust*, 500 U.S. at 200). Because the arts, "no less than the university, are 'at the core of a democratic society's cultural and political vitality,'" a funding restriction aimed at ideas considered offensive or disagreeable was impermissibly viewpoint-based. Pet.App. 22a-24a (quoting district court opinion, 795 F.Supp. at 1473).[10]

The government's petition for rehearing was denied on May 1, 1997. Pet.App. 91a. Judges O'Scannlain and Kozinski now joined Judge Kleinfeld in dissent. *Id.* at 92a. They argued that the void for vagueness doctrine should not apply when "the government is handing out a prize instead of meting out a punishment," *id.* at 93a; and that, similarly, "the First Amendment doesn't cover" situations in which the government "awards a special prize to a select few artists." *Id.*

The government timely filed a petition for a writ of *certiorari*.

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[9] (...continued)
as not fundamentally changing the decisionmaking standard. Pet.App. 7a-12a.

[10] The court of appeals did not reach the plaintiffs' additional argument that §954(d)(1) created an unconstitutional condition by imposing a "decency" and "respect" requirement on the lifetime work of artists who might seek NEA grants.

## REASONS FOR DENYING THE WRIT

The NEA's petition argues, in essence, that *certiorari* should be granted because the court of appeals invalidated a federal statute. Unable to point to a single decision that conflicts with the court of appeals' ruling in this case, the NEA instead argues that the decision below raises an important issue, and is wrong on the merits. But this Court's role is not to correct error,[11] and none of the reasons the NEA identifies for granting *certiorari* merits this Court's attention.

The NEA argues first that the court of appeals misinterpreted the statutory provision at issue. But the NEA's own proffered interpretation of the statute does not cure its constitutional infirmities. In fact, it makes them worse: in the court of appeals, the NEA characterized the statute as "indeterminate" and offering "no way to predict" how it would be implemented. That is the very definition of unconstitutional vagueness.

Second, the NEA argues that this Court's decision in *Rust v. Sullivan*, 500 U.S. 173, permits ideological discrimination in an arts subsidy program. But the NEA neglects to mention that the Court has limited *Rust* to situations where the government itself "is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 115 S.Ct. at 2518. The NEA conceded below that the awarding of NEA funds is "not the government's own speech," and does "not constitute government approval of a particular message or point of view." NEA Supp. C.A. Br. at 3-4. Those admissions render *Rust* inapplicable, and bring this case within the four corners of *Rosenberger*, which prohibits

[11] Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi (1949).



viewpoint-based discrimination in the allocation of subsidies to private speech.

Third, the NEA maintains that vagueness standards should not apply to statutes governing the allocation of subsidies to speech. But this claim, supported by no precedent, would give government officials unbridled discretion to use purse strings to control private speech. On the government's view, the Post Office could grant second class mailing privileges to any magazine it deemed "appropriate," leaving unfettered discretion to the Postmaster General. Because the concerns raised by unlimited discretion over speech apply to both subsidies and penalties, the court of appeals properly subjected the "decency and respect" provision to vagueness scrutiny.

Thus, apart from the fact that the court of appeals has invalidated a federal statute, the NEA offers no reason for this Court to grant *certiorari*. A decision to declare a federal statute unconstitutional is no doubt important, but where, as here, the decision creates no conflict and is fully consistent with this Court's established jurisprudence, *certiorari* should be denied.

## I. THERE IS NO CONFLICT AMONG THE CIRCUITS

As the NEA's petition concedes, the court of appeals' decision does not conflict with that of any court from any other circuit. Indeed, the NEA does not even mention a decision from another court of appeals until the last two pages of its petition, and then contends merely that the decision below is "in tension" with two other decisions. Pet. 27. Even the asserted "tension" is illusory. The Court should therefore deny *certiorari* until and unless a genuine conflict emerges.

The court of appeals' decision is not the first time courts have scrutinized the validity of criteria like "decency" and "respect" for government subsidies to speech, and its result is fully consistent with prior precedents. In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 549-50, 553 (1975), this Court struck down a municipal policy restricting access to a municipal auditorium -- a public subsidy -- to works that were "clean and healthful and culturally uplifting" because those criteria gave city officials "unbridled discretion." In *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151, 157-58 (1946), the Court reasoned that if a postal statute gave the Postmaster General the power to deny second-class mailing status -- also a valuable subsidy -- based on his determination that a magazine was "indecent," "morally improper" and "not for the public welfare and the public good," the statute would be unconstitutional. And most recently, in *Rosenberger*, the Court held that a university's refusal to subsidize student religious magazines was impermissibly viewpoint-based. 115 S.Ct. at 2517. If these standards for government subsidies to speech were improper, so too are "general standards of decency and respect for the diverse beliefs and values of the American public."[12]

[12] When lower courts have reached similar results in the past, the United States has declined to seek *certiorari*. In *Bullfrog Films v. Wick*, 847 F.2d 502, 512-14 (9th Cir. 1988), for example, the court of appeals invalidated USIA criteria for allocating benefits to documentary films as impermissibly vague and content-based, and the government chose not to seek *certiorari*. In *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C.Cir. 1980), the D.C. Circuit held unconstitutionally vague the Treasury Department's criteria for allocating nonprofit tax status to educational groups, and the government again declined to seek *certiorari*. The court of appeals' decision in this case applies the same principles to government subsidies, and is similarly unworthy of *certiorari*.

(continued...)



The two cases the NEA portrays as "in tension" with the court of appeals' decision are entirely distinguishable. Neither case involved a vagueness or viewpoint-based challenge to statutory criteria for an arts funding program. *Advocates for the Arts v. Thomson*, 532 F.2d 792, 795-96 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976), held merely that courts should not second-guess a government official's judgment that a funding application lacked *aesthetic* merit. This case does not question the authority of NEA officials to make aesthetic judgments, but questions the authority of Congress to superimpose extrinsic viewpoint-based and vague considerations on the allocation of subsidies to private speech.[13]

*Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985), did not involve a funding program at all. It upheld a college's decision about where to display a particular work of art, which it treated as akin to an act of "government speech." The college's concern was that what it displayed in the main lobby of its principal building would be deemed to express an official message. *Id.* at 630. But as this Court held in *Rosenberger*, the government's latitude to control the mes-

[12] (...continued)

Where government defendants have sought review of analogous decisions, this Court has denied *certiorari*. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985)(holding unconstitutionally vague a "family entertainment" standard for access to a municipal amphitheater).

[13] The court in *Advocates for the Arts* stated that the state's decision would have been unconstitutional if based on "such extrinsic considerations as applicants' political views, associations, or activities." *Id.* at 798 n.8. Since the "decency and respect" clause mandates just such viewpoint-based consideration of "extrinsic" factors, it would be unconstitutional under *Advocates for the Arts*.

sages it expresses does not extend to situations where, as here, it has created a funding program not to express an official *governmental* message, but to support a diverse range of *private* expressions.

## II. *CERTIORARI* IS NOT APPROPRIATE TO RESOLVE THE ISSUE OF STATUTORY CONSTRUCTION PRESENTED BY THE GOVERNMENT BECAUSE, EVEN UNDER THE GOVERNMENT'S INTERPRETATION, THE "DECENCY AND RESPECT" CLAUSE IS UNCONSTITUTIONAL

The NEA argues that the court of appeals erroneously interpreted §954(d)(1) to require application of the "decency and respect" criteria to each grant. Pet. 16-18. But the NEA does not dispute that "decency and respect" must be taken into consideration in "the grant awarding process." Pet. 17. Therefore, nothing turns on the NEA's disagreement with the court of appeals over the minutiae of precisely how "decency and respect" are taken into account. As long as these terms are part of the "grant awarding process," their vagueness and viewpoint-based character will create all the risks of discrimination, arbitrariness and chill that the First Amendment is designed to forestall.

Moreover, the NEA's reading of the statute only exacerbates its vagueness. It has argued that the statute is so open-ended that it could be implemented in an infinite variety of ways. The NEA has interpreted the statute as "indeterminate," NEA C.A. Br. at 31, and has stated that there is "no way to predict what the Chairperson's [] manner of implementing it would be." *Id.* at 39. Thus, the NEA's own interpretation affords the NEA Chairperson untrammeled discretion -- the precise evil that the vagueness doctrine is designed to prevent.



Furthermore, no limiting construction can save an "indeterminate" statute. In *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964), this Court declined to abstain in order to permit a state court to construe a statute challenged as vague, reasoning that "the challenged [statute] is not open to one or a few interpretations, but to an indefinite number." For the same reason, the Court in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), rejected a narrowing interpretation of a city ordinance that on its face gave the mayor unfettered discretion in allocating space for newsboxes on city property. The city asked the Court "to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens." *Id.* at 770. The Court declined, stating that "this is the very presumption that the doctrine forbidding unbridled discretion disallows." *Id.* Thus, even where a satisfactory saving construction has been offered, the Court cannot rewrite a perfectly vague statute. Where, as here, the agency's own reading of the statute accords itself unfettered discretion, no saving construction has even been put on the table.

Finally, the NEA's suggestion that §954(d)(1) does not require the application of the "decency and respect" standard to individual grant requests is contrary to the statute's plain meaning and legislative history.[14] Perhaps most tellingly, the NEA itself interpreted and implemented the statute, before its invalidation, to require every NEA official who re-

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[14] As noted above, the "decency and respect" provision's author, Representative Henry, introduced it as "a shell, a screen, a viewpoint that must be constantly taken into account." 136 Cong.Rec. H9417 (Oct. 11, 1990). He also described it as "new language now in the grant procedure itself which mandates that in the awarding of funds, in the award process itself, general standards of decency must be accorded." 136 Cong.Rec. H9457 (Oct. 11, 1990).

viewed a grant application to apply the "decency" and "respect" standards as they individually understood them.[15] Thus, the NEA's statutory construction arguments do not warrant *certiorari* review.

## III. IN LIGHT OF THE GOVERNMENT'S CONCESSION THAT THE NEA PROGRAM IS NOT DESIGNED TO EXPRESS A GOVERNMENTAL MESSAGE BUT TO SUPPORT A DIVERSITY OF VIEWS FROM PRIVATE SPEAKERS, THE FIRST AMENDMENT PROHIBITS VIEWPOINT DISCRIMINATION

The statute at issue requires NEA officials to determine whether an applicant's work respects or does not respect "the diverse beliefs and values of the American public," and whether the work is consistent with "general standards of decency." These are classic instances of viewpoint discrimination. The statutory criteria direct a government official to favor respectful or decent treatments of subjects and to disfavor disrespectful or indecent treatments.

The NEA contends that the "decency and respect" clause does not discriminate on the basis of viewpoint. Pet. 18-19. But if a standard that turns on whether one shows *respect* or *disrespect* toward the American public's "beliefs and values" is not viewpoint-based, the term has no meaning. This Court has carefully distinguished viewpoint discrimination from subject matter prohibitions: the government may generally refuse to fund an entire subject, but when it takes sides by refusing to fund particular perspectives on that subject, it engages in viewpoint discrimination. Thus, the constitutional defect in *Rosenberger* was that "the University d[id] not exclude religion as a subject matter but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints . . . . The prohibited perspective, not the general subject matter, resulted in the refusal to [fund]." 115 S.Ct. at 2517; *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

Like the student funding program in *Rosenberger*, the NEA's "decency and respect" clause does not deny funding to art on a subject matter basis, but discriminates against those treatments of any subject that an NEA official deems "indecent" or "disrespectful." Thus, as the panel noted, a painting of the American flag could be funded if "decent" and "respectful," but not if deemed indecent or disrespectful of an indeterminate number of "beliefs and values." Pet. App. 24a.

The NEA argues that *Rust v. Sullivan*, 500 U.S. 173, permits Congress to impose viewpoint discriminatory criteria because it is merely subsidizing, not penalizing, speech. But this Court has already rejected that contention in *Rosenberger*. In *Rosenberger*, the university sought to defend its selective denial of funding to religious student magazines by relying on the same interpretation of *Rust* that the NEA advances here. Pet. 20; *Rosenberger*, 115 S.Ct. at 2518. The Court rejected that argument, and expressly restricted *Rust* to situations where the government itself "is the speaker or when it enlists private entities to convey its own message." 115 S.Ct. at 2518. In language fully applicable here, the Court held that it "*does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself*

[15] As detailed in the Statement of the Case, *see supra* pp.4-5, applications to the NEA were individually subjected to the "decency and respect" clause at every stage of the review process, from the initial panels' recommendations to the Chairperson's final approval.

*speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.*" *Id.* at 2519 (emphasis added).

The government acknowledged in the court of appeals that the NEA program is designed to encourage a diversity of views from private speakers, and not to fund "government art." It stated that "the artistic expression funded by an NEA grant is not the government's own speech; the NEA's award of the grant does not constitute government approval of a particular message or point of view that may be communicated by the work of art; and public funds support a diversity of projects and productions within the overall arts program." NEA C.A. Supp. Br. at 3-4. These admissions fully support the court of appeals' reliance on *Rosenberger*, and refute the NEA's attempt to rely on *Rust* now.[16]

The NEA objects that its funding program is different from the program at issue in *Rosenberger* because there 118 of 135 student groups were supported, whereas the NEA program is more selective. But the number of applicants who received grants cannot constitute a principled distinction. As the Court stated in *Rosenberger*, "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." 115 S.Ct. at 2519; *see also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811-13 (1985)(even in nonpublic forum, where access to government support for speech is by definition selective, the criteria for access to nonpublic forum must be viewpoint-neutral).[17]

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[16] As the language of the statute and the legislative history recounted in the Statement of the Case make clear, *see supra*, p.1, the last thing Congress wanted was to create a program of official government art. Thus, when President Johnson proposed to create the NEA, he insisted that the government not "seek to restrict the freedom of the artist to pursue his calling in his own way." S. Rep. No. 300, at 13. And Representative William Ford, speaking in favor of the bill, expressed concern that government funding, if implemented improperly, might hinder free expression, but concluded that "[i]f, however, we have Government assistance, but not intervention; if we have support but not control; if we have stimulation but not participation, then we shall have constructive action in the best interests of the Nation." 111 Cong.Rec. 23961 (1965).

[17] The dissent below offered a "prize" theory for justifying what would otherwise be impermissible viewpoint-based and vague criteria for government funding. Pet.App. 27a-47a (Kleinfeld, dissenting). In essence, the dissent contended that a highly selective funding program is more akin to a "prize" than a broad-based entitlement program, that viewpoint-based criteria are necessary to effectuate such selectivity, and that a "prize" program is unlikely to distort the marketplace of ideas. That theory finds no support in the case law, and is directly contrary to this Court's rejection of scarcity of available benefits as a rationale for viewpoint discrimination in *Rosenberger*. Because government always operates in a world of limited resources, any subsidy or benefit can be denominated a "prize." Neither the government nor the dissent below has identified at what degree of selectivity a benefits program, otherwise governed by the First Amendment, becomes a "prize" program immune from constitutional scrutiny. Moreover, the "prize" theory would allow government to circumvent any judicial decision declaring the criteria for a benefits program unconstitutional by simply making the program more selective and continuing to apply the invalidated criteria. The only relevant line this Court has recognized is the distinction between government speech and a government subsidy program designed to support a diversity of private voices. *Rosenberger*, 115 S.Ct. at 2518-19. And the government has conceded that the NEA program falls in the latter category.

## IV. VAGUENESS STANDARDS APPLY TO THE SELECTIVE ALLOCATION OF FUNDING TO COMMUNICATIVE ACTIVITIES

As the court of appeals correctly found, the statutory reference to "general standards of decency" and "respect for the diverse beliefs and values of the American public" not only disfavors controversial viewpoints, but also fails to provide clear guidelines to either NEA applicants or government decisionmakers. Pet.App. 17a-19a. There is simply no meaningful way to determine the beliefs and values of the American public, much less to assess whether an artist's work "respects" or "disrespects" those beliefs and values. The "American public," if it could even be identified, would no doubt hold many conflicting beliefs and values, and to respect one may be to disrespect another. By the NEA's own admission, these criteria extend "indeterminate" discretion to the subjective views of the Chairperson and other NEA officials. That is the very definition of vagueness. Likewise, "general standards of decency" is hopelessly vague. *Reno v. ACLU*, __ U.S. __, __, 117 S.Ct. 2329, 2344-46 (1997).

Accordingly, the NEA is forced to argue that the vagueness doctrine simply does not apply to government subsidies for speech. Pet. 24-25. Because there is no affirmative First Amendment right to funding *ab initio*, they contend, neither the First nor Fifth Amendments require that the criteria used for allocating subsidies to speech be clear. *Id.* But that position, correctly rejected by the court of appeals, is directly contrary to this Court's precedents. On this theory, the ordinance struck down in *City of Lakewood*, 486 U.S. at 769-72, which gave the mayor unbridled discretion to allocate scarce public property for newsboxes, would have been constitutional; since there was no right to newsbox space, there should have been no constraint on the government employing "unbridled discretion" to allocate such



space. And if the government were correct, officials could adopt wholly vague standards for speakers' access to nonpublic forums, because access to such forums is a government benefit as to which there is no affirmative right. That conclusion is contrary to *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 576-77 (1987), in which this Court refused to adopt a proffered construction of a regulation governing access to a municipal airport -- a nonpublic forum -- because the construction would have rendered the regulation unconstitutionally vague.

The NEA argues that the concerns that animate the First and Fifth Amendment vagueness doctrines are not present when the government subsidizes speech on wholly vague criteria, because denial of funds "does not penalize speech in any meaningful sense." Pet. 24. But as *City of Lakewood* and *Jews for Jesus* demonstrate, whether the government uses its purse strings or its police power to affect private speech in the marketplace of ideas, when it does so pursuant to vague criteria, the potential for discriminatory application and the consequent chilling effect on citizens' speech make the vagueness doctrine essential. Pet.App. 15a-16a.

Finally, the NEA's suggestion that if the NEA can consider "aesthetic excellence," it must also be free to consider "decency and respect," is unavailing, as the court of appeals and district court both held. Pet.App. 18a-19a, 86a-87a. Just as a public university may grant or deny tenure on the basis of academic merit, but not loyalty, *see, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 601 (1967)(holding that vague oath required as condition of employment as public school teacher "stifle[s] . . . 'free play of the spirit'" in violation of the First Amendment), so the NEA may allocate grants on the basis of artistic merit, but not decency. Artistic and academic merit standards, unlike "decency" and "respect," have governed the art and academic worlds for centuries, and have developed objective content through appli-

cation. If that were not the case, merit-based judgments in hiring, grading, and promotion, on which schools and employers routinely rely, would be impossible. *Cf. Gentile v. State Bar*, 501 U.S. 1030, 1049 (1991)(in assessing vagueness, court should look to whether terms have "settled usage or a tradition of interpretation"). "General standards of decency" and "respect for the diverse beliefs and values of the American public," by contrast, have no tradition of application, and are open to infinite interpretations based on inescapably subjective notions of decency, respect, and the American public's "beliefs and values."[15]

[15] The petition also should be denied because there is an independent basis for affirmance, not reached by the court of appeals. The "decency and respect" restriction is a classic unconstitutional condition, because it does not merely restrict what grantees can do with the government's funds; instead, it is part of "the criteria by which applications are judged," 20 U.S.C. §954(d)(1), and those criteria are applied to an applicant's entire body of work, including work created solely with private funds. *See supra*, pp.3-4. As this Court has stated, the government imposes an "unconstitutional condition" on funding for speech when it "place[s] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust v. Sullivan*, 500 U.S. at 196; *see also FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).



## CONCLUSION

For all the above reasons, the petition for a writ of *certiorari* should be denied.

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